

APPENDIX

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APPENDIX A

No. 25-5465

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF
AMERICA,

Plaintiff-Appellee

v.

MARIO DELAINE,

Defendant-Appellant.

O R D E R

BEFORE: GIBBONS, LARSEN, and MURPHY,
Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.
MARIO DELAINE,
Defendant-Appellant.

No. 25-5465

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.
No. 1 :23-cr-00069-1—Charles Edward Atchley Jr.,
District Judge.

Argued: January 29, 2026

Decided and Filed: April 2, 2026

Before: GIBBONS, LARSEN, and MURPHY, Circuit
Judges.

COUNSEL

ARGUED: Conrad Benjamin Kahn, FEDERAL
DEFENDER SERVICES OF EASTERN
TENNESSEE, INC., Knoxville, Tennessee, for
Appellant. Luke A. McLaurin, UNITED STATES
ATTORNEY'S OFFICE, Knoxville, Tennessee, for
Appellee. **ON BRIEF:** Conrad Benjamin Kahn,
FEDERAL DEFENDER SERVICES OF EASTERN

TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

OPINION

MURPHY, Circuit Judge. The Armed Career Criminal Act requires a court to impose a minimum sentence of 15 years' imprisonment for felons who possess firearms if they have three prior "violent felony" convictions. 18 U.S.C. § 924(e)(1). The statute defines the phrase "violent felony" in part to include an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another[.]" *Id.* § 924(e)(2)(B)(i). The district court in this case held that this definition covered three of Mario Delaine's prior convictions and thus applied the 15-year minimum. Delaine has appealed. His appeal raises complex questions about the scope of the Armed Career Criminal Act. To name a few: When deciding whether a state-law offense qualifies as a "violent felony," must a sentencing court look only to the state-law precedent at the time of a defendant's conviction, or may it rely on later state-court decisions that clarify the offense's elements? And can an offense qualify as a violent felony if the defendant intentionally uses force against another person but does not intend for the force to cause an injury? Despite the excellent advocacy of Delaine's counsel, we disagree with him over the Act's requirements and the nature of his prior offenses. Because all three of those offenses are violent felonies, we affirm.

On November 5, 2022, a caller reported to the police that someone had discharged a weapon at a Motel 6 in Chattanooga, Tennessee. When the police arrived at the motel, they heard a suspect fire shots out the window of a motel room. As officers made their way to this room, the suspect fired another round through the door. The officers announced their presence and ordered everyone to exit. Delaine followed a woman out of the room. The woman gave the officers permission to search it. They uncovered a pistol and shell casings. They also located bullet holes in the window and door. Delaine confessed that he had fired the gun even though he could not lawfully possess a firearm as a convicted felon.

The government charged Delaine with one felon-in-possession count. *See* 18 U.S.C. § 922(g)(1). It also alleged that his prior convictions subjected him to a minimum sentence of 15 years' imprisonment under the Armed Career Criminal Act. *See id.* § 924(e)(1). The parties entered a plea deal under Federal Rule of Criminal Procedure 11(c)(1)(C). Delaine agreed to plead guilty to the sole count. The government agreed to a sentence of no more than 200 months' imprisonment. It also gave Delaine the right to appeal a decision that he qualified for the Armed Career Criminal Act's enhanced penalty.

At sentencing, the parties spent most of the time debating whether the Act's enhancement applied based on three of Delaine's prior convictions: a Florida aggravated-assault conviction from 2012; a Florida felony-battery conviction from 2009; and an Ohio domestic-violence conviction from 2019. The district court sided with the government and imposed the Act's enhancement. Ultimately, it sentenced Delaine to 188 months'

imprisonment.

II

Delaine argues on appeal that the district court mistakenly applied the Armed Career Criminal Act's increased punishment. He is mistaken.

A. General 'Armed Career Criminal Act' Principles

When felons illegally possess firearms, the law generally subjects them to a maximum sentence of 15 years' imprisonment. *See* 18 U.S.C. §§ 922(g)(1), 924(a)(8). But the Armed Career Criminal Act turns this maximum sentence into a minimum one for qualifying defendants. *See id.* § 924(e)(1). Under the Act, if a defendant “has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another,” a court must sentence the defendant to “not less than fifteen years” of imprisonment. *Id.*

This case turns on the Act's definition of “violent felony.” *See id.* § 924(e)(2)(B). As relevant here, a prior conviction qualifies as a “violent felony” if it “has as an element the use, attempted use, or threatened use of physical force against the person of another[.]” *Id.* § 924(e)(2)(B)(i). The Supreme Court has interpreted this so-called “elements clause” (like similar clauses in other laws) to adopt a well-known “categorical approach.” *Borden v. United States*, 593 U.S. 420, 424 (2021) (plurality opinion); *see United States v. Taylor*, 596 U.S. 845, 850 (2022). That approach requires us to consider in the abstract whether every conviction for a given criminal offense would satisfy the elements clause because they would all necessarily include “the use, attempted use, or threatened use of physical force against the person of

another[.]” 18 U.S.C. § 924(e)(2)(B)(i); *see Borden*, 593 U.S. at 424 (plurality opinion). In contrast, we do not consider the facts of a specific conviction or whether a defendant’s specific conduct used, attempted, or threatened force. *Borden*, 593 U.S. at 424 (plurality opinion). In other words, an offense *categorically* falls outside the Act whenever the “least culpable” conduct that the offense covers does not qualify. *Id.*

The Supreme Court has interpreted the elements clause to contain both a state-of-mind (*mens rea*) component and a conduct (*actus reus*) component. *See id.* at 429 (plurality opinion) (state of mind); *Johnson v. United States*, 559 U.S. 133, 138 (2010) (conduct); *see also* 5 St. George Tucker, *Blackstone’s Commentaries* 21 (1803). Start with the conduct component. An offense can qualify if a defendant must “use,” “attempt[.]” to use, or “threaten[.]” to use “physical force against the person of another” to commit it. 18 U.S.C. § 924(e)(2)(B)(i). The Court has defined this language’s key phrase (“physical force”) to cover only “*violent* force” that could “caus[e] physical pain or injury to another person.” *Johnson*, 559 U.S. at 140. And it has applied this definition to two common-law crimes: battery and robbery. According to the Court, the force necessary to commit a common-law battery—“the slightest offensive touching”—does not satisfy this definition. *Id.* at 139. But the Court has added that the force necessary to commit a common-law robbery—the force required “to overcome the victim’s resistance”—does satisfy it. *Stokeling v. United States*, 586 U.S. 73, 77 (2019). This force may qualify even if it results in only ‘minimal pain or injury.’ *Id.* at 84. Beyond all that, the force can also qualify even if the offender “cause[s] harm by omission”—that is, by failing to act

when the offender has a duty to act (such as a parent starving a child to death). *Delligatti v. United States*, 604 U.S. 423, 433-34 (2025).

Turn to the state-of-mind component. The elements clause does not expressly identify any required state of mind. Yet the Supreme Court has found a state-of-mind component implied in the clause’s text. The Court has held that this text excludes crimes “with a *mens rea* of recklessness” (or lower) from its reach. *Borden*, 593 U.S. at 445 (plurality opinion); *see id.* at 446 (Thomas, J., concurring in the judgment). So when a person intentionally deploys force (say, by driving a car) but acts recklessly or negligently about whether this force will hit a person (say, by accidentally striking a pedestrian), the person has not “use[d] ... physical force against the person of another[.]” 18 U.S.C. § 924(e)(2)(B)(i); *see Borden*, 593 U.S. at 429, 432 (plurality opinion); *id.* at 446 (Thomas, J., concurring in the judgment); *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004).

In *Borden*, however, the Court splintered as to the rationale for this holding. A four-Justice plurality relied on two textual considerations. *See Borden*, 593 U.S. at 430-34 (plurality opinion). The plurality first explained that the phrase “use of physical force” required a “‘volitional’ or ‘active’ employment of force” (as compared to an involuntary muscle spasm). *Id.* at 430 (quoting *Voisine v. United States*, 579 U.S. 686, 693 (2016)). Relying on the Court’s earlier decision in *Voisine*, the plurality believed that this phrase-by itself-could include recklessly harming others through such volitional acts. *See Borden*, 593 U.S. at 428-29, 442 (plurality opinion); *see also Voisine*, 579 U.S. at 693-94. But the plurality next explained that the phrase ‘against the person of another’

(when modifying “use” of “physical force”) conveyed that a victim must be ‘the conscious object’ of the force. *Borden*, 593 U.S. at 430-32, 443 (plurality opinion). The plurality thus relied on this second phrase in the elements clause to exclude volitional motions that recklessly hit others. *See id.* By way of example, the plurality distinguished between a driver who knowingly drove “his car straight at a known victim” to escape the police and one who recklessly struck “a pedestrian whom he did not see” while running a red light. *Id.* at 432. According to the plurality, the first driver would have used force against the person of another in a way that the second driver would not have. *Id.*

Justice Thomas took a different path to the same result. He relied on the phrase “use of physical force” *alone* to conclude that negligent and reckless conduct fell outside the elements clause. *See id.* at 446 (Thomas, J., concurring in the judgment). In his view, this phrase had “a well-understood meaning applying only to intentional acts designed to cause harm.” *Id.* (quoting *Voisine*, 579 U.S. at 713 (Thomas, J., dissenting)). As he said in his *Voisine* dissent, the phrase would not cover a party who recklessly deployed force—such as a man who texted while driving and got into an accident that injured a passenger. *See* 579 U.S. at 707 (Thomas, J., dissenting).

B. Application

Delaine has an aggravated-assault conviction from Florida, a felony-battery conviction from Florida, and a domestic-violence conviction from Ohio. He argues that these convictions are not “violent felonies” because they cannot meet the state-of-mind or the conduct component of the elements clause. We will take the convictions in turn, reviewing *de novo* the district court’s decision that all

three qualify. *See United States v. Campbell*, 122 F.4th 624, 628 (6th Cir. 2024).

1. Florida Aggravated Assault

We begin with Delaine’s 2012 conviction for aggravated assault in Florida. Florida law relies on its “assault” statute to create its “aggravated assault” offense. That law first defines a regular assault as “an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.” Fla. Stat. § 784.011(1). It then defines an “aggravated assault” as an ordinary assault that is either “[w]ith a deadly weapon without intent to kill” or “with an intent to commit a felony.” *Id.* § 784.021(1)(a)-(b). The parties agree that this statute is “divisible” into two aggravated-assault offenses—one involving the use of a deadly weapon and the other involving the intent to commit another felony. *See Descamps v. United States*, 570 U.S. 254, 257 (2013). And they agree that Delaine committed the deadly weapon version.

Does this Florida offense satisfy the conduct and state-of-mind components to qualify as a violent felony under the elements clause? Our answer is an unambiguous yes. To start, Delaine does not dispute (and so we may assume) that the offense satisfies the conduct element because it requires a “threatened use” of the type of “*violent force*” that falls within the elements clause. 18 U.S.C. § 924(e)(2)(B)(i); *Johnson*, 559 U.S. at 140. Next, both text and precedent show that the offense meets the state-of-mind requirement because it demands more than a reckless threat. *See Borden*, 593 U.S. at 432 (plurality opinion). The offense’s text requires a defendant to have

“*intentional[ly]*” (not merely recklessly) directed a threat at another person. Fla. Stat. § 784.011(1) (emphasis added); *id.* § 784.021(1). And the Florida Supreme Court confirmed this reading when the Eleventh Circuit certified a question about this crime’s intent element for purposes of the Armed Career Criminal Act. *See Somers v. United States*, 355 So. 3d 887, 891-92 (Fla. 2022). In *Somers*, the Florida Supreme Court held that the law requires “an intentional threat to do violence to another person.” *Id.* at 891. As a result, aggravated assault is a violent felony.

Delaine responds by looking to the past. He argues that a defendant could have been convicted for negligent or reckless threats of violence under this aggravated-assault statute when a court convicted him in 2012. Yet Delaine does not rely on an older version of the statute that Florida’s legislature has since amended. The relevant statutory provision remains the same today as it was in 2012. Rather, Delaine argues that some Florida cases had read the statute to encompass negligent or reckless threats before the Florida Supreme Court clarified things in *Somers*. Because these courts allegedly allowed a jury to convict a defendant for negligent or reckless threats when Delaine committed aggravated assault, this reasoning goes, the crime did not satisfy the categorical approach at that time. The Seventh Circuit has accepted this argument. *See United States v. Anderson*, 99 F.4th 1106, 1111-12 (7th Cir. 2024). Like the Eleventh Circuit, though, we must reject it. *See Somers v. United States*, 66 F.4th 890, 895-96 (11th Cir. 2023).

At the outset, Delaine finds some support for his view in a pair of Supreme Court cases. The Court has twice asked whether a prior conviction can qualify as a “violent

felony” or “serious drug offense” if the statutory (or regulatory) law has changed in a way that renders the prior offense ineligible at the time of a defendant’s *current felon-in-possession conviction-even* if it was eligible at the time of the defendant’s *prior conviction*. See *Brown v. United States*, 602 U.S. 101, 111 (2024); *McNeill v. United States*, 563 U.S. 816, 820 (2011). For these types of statutory changes, the Court has held that a sentencing court must “examine the law as it was when the defendant violated it, even if that law is subsequently amended.” *Brown*, 602 U.S. at 111.

Further supporting Delaine’s reading, some circuit courts have suggested that this same backward-looking framework applies when the judiciary departs from a prior interpretation of an unamended law after the defendant’s prior conviction. For example, some circuits have said that a sentencing court may not rely on a later-in-time state supreme court decision that departed from earlier lower-court decisions. See *Anderson*, 99 F.4th at 1111-12; *United States v. Cornette*, 932 F.3d 204, 214-15 (4th Cir. 2019). And other circuits have held that a sentencing court must look to the reading given by the state’s highest court at the time of the defendant’s conviction even if that court later overruled this reading. See *United States v. Vickers*, 967 F.3d 480, 486-87 (5th Cir. 2020), *vacated*, 141 S. Ct. 2783 (2021); *United States v. Roblero-Ramirez*, 716 F.3d 1122, 1126-27 (8th Cir. 2013); see also *United States v. Faust*, 853 F.3d 39, 57-58 (1st Cir. 2017).

But these circuit cases may have overlooked an important factor: statutory amendments trigger different background interpretive rules than judicial decisions. On the one hand, courts have long followed a “sacred”

presumption that statutory amendments apply only prospectively to future conduct-not retroactively to prior conduct. *Reynolds v. McArthur*, 27 U.S. 417, 434 (1829); see *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-69 (1994); *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 769 (C.C.D.N.H. 1814) (Story, J.). The Supreme Court’s decisions in *Brown* and *McNeill* make good sense against this background rule. The rule means that later amendments do not apply to a defendant’s earlier conduct. And a sentencing court should look to the law on the books at the time of that conduct (not a changed law) to decide whether the defendant committed a “violent felony” or “serious drug offense” under the Armed Career Criminal Act.

On the other hand, a different background rule has always applied to judicial decisions. Courts presume that a decision interpreting a law “applies retroactively” because the decision reveals what the law *always* meant (both before and after the decision). *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 56 (2015); see *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-13 & n.12 (1994); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982). As Blackstone explained, when a court changed its interpretation, it did not “make a new law, but ... vindicate[d] the old one from” a prior “misrepresentation.” 1 St. George Tucker, *supra*, at 69. Because we assume that federal laws incorporate these types of background rules, see *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991), one might think this competing rule should hold sway for judicial (in contrast to legislative) changes in the context of the Armed Career Criminal Act.

Does it matter, though, that the Florida courts limit

the ability of criminal defendants to use new statutory interpretations to collaterally attack final criminal judgments? *See Dettle v. State*, 395 So. 3d 1054, 1057 (Fla. 2024); *State v. Barnum*, 921 So. 2d 513, 528 (Fla. 2005); *cf. Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). The Seventh Circuit thought this equitable limit on postconviction relief meant that a later judicial interpretation *changed* the statute. *See Anderson*, 99 F.4th at 1111-12. But just because the Florida courts refuse to grant collateral relief to defendants based on new judicial decisions does not mean that those decisions have the power to amend (rather than interpret) the law. *See Hester v. State*, 267 So. 3d 1084, 1086 (Fla. Dist. Ct. App. 2019). Besides, the inquiry that Delaine requests would seem to conflict with the Supreme Court’s “categorical approach,” which *categorically* treats a state offense as an eligible violent felony or an ineligible nonviolent one. *See Mathis v. United States*, 579 U.S. 500, 504-05 (2016). Under Delaine’s view, by contrast, the same offense might constantly switch between these two categories depending on each new judicial decision. And what if different intermediate appellate courts adopt different readings (which are binding in their respective districts but not in others)? Should an offense’s “violent felony” status turn on the district in which the defendant is convicted?

Further, while a rule disregarding later-in-time judicial decisions might help Delaine, it might “hurt” other defendants. *See Brown*, 602 U.S. at 122. Here, for example, suppose that Florida’s state intermediate courts had all previously held that aggravated assault required intent (and so qualified as a violent felony), but the Florida Supreme Court later held that a reckless threat could

suffice (which would disqualify the crime from violent-felony treatment). Under Delaine’s rule, we might have to treat aggravated assault as a violent felony for the many defendants convicted before the state supreme court’s clarifying interpretation even though that interpretation revealed what the law had “always meant.” *Hester*, 267 So. 3d at 1086. Given that Delaine’s reading may well harm as many defendants as it helps, the rule of lenity likely provides no aid in deciding this issue. *Brown*, 602 U.S. at 123; *cf. Vickers*, 967 F.3d at 486.

Ultimately, though, we need not enter this debate to decide this case. Even if we must ignore changes in judicial interpretation that postdate a defendant’s prior conviction, the Florida Supreme Court did not change Florida law in *Somers*. Before Delaine’s 2012 conviction, every Florida appellate court described assault or aggravated assault as requiring intent. *See Bartley v. State*, 689 So. 2d 372, 373 (Fla. Dist. Ct. App. 1997) (First District) (per curiam); *Pinkney v. State*, 74 So. 3d 572, 576 (Fla. Dist. Ct. App. 2011) (en banc) (Second District); *Lavin v. State*, 754 So. 2d 784, 787 (Fla. Dist. Ct. App. 2000) (Third District); *Benitez v. State*, 901 So. 2d 935, 937 (Fla. Dist. Ct. App. 2005) (Fourth District); *Cambell v. State*, 37 So. 3d 948, 950 (Fla. Dist. Ct. App. 2010) (Fifth District). Some courts treated aggravated assault as “a specific intent crime.” *Bartley*, 689 So. 2d at 373. Another court incorporated common-law rules that defined intent to include a volitional statement or action that the defendant knew was “substantially certain” to be taken as a threat by the victim. *Pinkney*, 74 So. 3d at 576. That court thus defined ‘intent’ to require what the Supreme Court would describe as a knowing state of mind. *See Borden*, 593 U.S. at 426 (plurality opinion) (citation

omitted); *Voisine*, 579 U.S. at 704-05 (Thomas, J., dissenting) (citing Restatement (Second) of Torts § 8A cmt. b (Am. L. Inst. 1965)). Further, all these courts would not hesitate to grant judgment as a matter of law to defendants when the prosecution failed to present enough evidence that the defendants intended to convey a threat. *See Denard v. State*, 30 So. 3d 595, 596 (Fla. Dist. Ct. App. 2010); *Swift v. State*, 973 So. 2d 1196, 1199 (Fla. Dist. Ct. App. 2008); *Benitez*, 901 So. 2d at 937; *Turner v. State*, 771 So. 2d 1286, 1286 (Fla. Dist. Ct. App. 2000) (per curiam); *see also Dobosh v. State*, 684 So. 2d 276, 277 (Fla. Dist. Ct. App. 1996).

Since 1981, Florida’s standard jury instructions have likewise required an intentional threat. *See In re Standard Jury Instructions in Crim. Cases*, 131 So. 3d 755, 758-59 (Fla. 2013) (per curiam). Near the time of Delaine’s conviction, the instructions provided that the prosecution must prove that a defendant “*intentionally* and unlawfully threatened, either by word or act, to do violence to” a victim. *Id.* at 758 (emphasis added). And notably, the Florida Supreme Court approved these instructions and has long presumed that they accurately reflect Florida law. *See id.* at 755; *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001) (per curiam).

To reach the contrary claim, Delaine relies on two cases from Florida’s Fifth District Court of Appeals: *Kelly v. State*, 552 So. 2d 206 (Fla. Dist. Ct. App. 1989), and *LaValley v. State*, 633 So. 2d 1126 (Fla. Dist. Ct. App. 1994). The Seventh Circuit read these cases as holding that “assault could be committed recklessly[.]” *Anderson*, 99 F.4th at 1110. But the analysis in the opinions does not support that broadbrush conclusion.

Start with *Kelly*. There, the defendant confronted his

“estranged girlfriend” (Frederica) while she and her friend (Dorothy) were sitting in Dorothy’s car. *Kelly*, 552 So. 2d at 207. Frederica refused the defendant’s demands to get out of the car, so he pointed a gun at her. *Id.* As Dorothy sped away, the defendant shot a round into the windshield. *Id.* A wild chase (with two more gunshots) ensued. *Id.* “A bullet fragment hit Dorothy’s finger,” and lead and glass shards landed on Frederica’s sweater. *Id.* The prosecution charged the defendant with (among other things) aggravated assault of Dorothy. *Id.* at 208. In a brief paragraph, the court upheld this conviction. *Id.* It recognized that aggravated assault required “intent.” *Id.* But it saw no direct ‘proof’ that the defendant intended to threaten Dorothy. *Id.* Still, it said that the required “proof” of intent “may be supplied by proof of conduct equivalent to culpable negligence” or “willful and reckless disregard for the safety of others.” *Id.* *Kelly* thus held that a reasonable jury could find that the defendant intended to threaten the victim based on his dangerous conduct toward her. *Cf. Kirtsinger v. State*, 126 So. 767, 768-69 (Fla. 1930). In other words, *Kelly*’s statements about recklessness and negligence concerned *the evidence that suffices* for a jury to find intent. The statements did not construe *the elements of aggravated assault*. The decision thus does not support Delaine’s view that the court interpreted aggravated assault to reach unintentional threats.

Turn to *LaValley*. The victim there got into an argument with the defendant’s brother. *See LaValley*, 633 So. 2d at 1127. The victim headed home, but the defendant and her brother gave chase in her car. *See id.* Her vehicle “came within one foot” of the victim, and she drove onto his yard. *See id.* The prosecution charged the defendant

with aggravated assault. *See id.* But the jury found her guilty of a lesser-included offense: reckless driving. *See id.* The court affirmed. *Id.* at 1228. It reasoned that “a charge that one committed an aggravated assault by intentionally driving her vehicle in a threatening manner subsumes the elements of reckless driving.” *Id.* at 1227. The court thus expressly recognized that aggravated assault required intent to threaten and held that a crime with a lower mental state (reckless driving) could qualify as a lesser-included offense. Other Florida decisions have thus read *LaValley* as merely articulating rules about lesser-included offenses. *See Anderson v. State*, 291 So. 3d 531, 536 (Fla. 2020). Delaine cites no case that reads *La Valley* to suggest that aggravated assault *itself* requires only a reckless state of mind.

Later decisions from the Fifth District Court of Appeals leave no doubt that Delaine (and the Seventh Circuit) misread *Kelly* and *LaValley*. Two years after *LaValley*, the court treated aggravated assault as “a specific intent crime” and so reversed a conviction because the trial court refused to allow the defendant to make a “voluntary intoxication” defense to this crime. *Dobosh*, 684 So. 2d at 277. Two years before Delaine’s conviction, the court reversed an aggravated-assault conviction because the prosecution introduced insufficient evidence that the defendant “had the specific intent to threaten” a victim hiding under a truck during a robbery. *Denard*, 30 So. 3d at 596. And four months after that decision, the court clarified again that the assault statute “inherent[ly]” required the “intention to make a threat to do violence.” *Cambell*, 37 So. 3d at 950.

All told, we see no “realistic probability” that a Florida court would have read the aggravated-assault

statute to reach reckless or negligent threats at the time of Delaine’s conviction. *United States v. Cervenak*, 135 F.4th 311, 326 (6th Cir. 2025) (en bane) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The “text of the state statute” required an intentional threat. *Id.* And many state decisions confirmed this unambiguous meaning.

One last point. In *Borden*, the plurality opinion held that the phrase the “use of physical force against the person of another” excluded crimes involving the reckless use of force. 593 U.S. at 429 (plurality opinion). Technically, Delaine’s aggravated-assault offense involves a different part of the elements clause—namely, the part that covers the “*threatened* use of physical force against the person of another[.]” 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). And the Supreme Court has suggested that a different “threats” statute (one that prohibits a “threat to injure the person of another,” *id.* § 875(c)) might be best read to include defendants who are *reckless* about whether their victims will interpret their statements as threats. *See Elonis v. United States*, 575 U.S. 723, 741-42 (2015); *see also id.* at 744-46 (Alito, J., concurring in part and dissenting in part); *United States v. Sheikh*, 164 F.4th 629, 634 (7th Cir. 2026). Might this same reading apply to the language “threatened use of force” in the elements clause? Because the parties have not briefed this question, we can leave it for another day.

2. Florida Felony Battery

We next turn to Delaine’s Florida conviction for felony battery from 2009. This offense has two elements. The defendant must “[a]ctually and intentionally touch[] or strike[] another person against the will of the other[.]” Fla. Stat. § 784.041(1)(a). And that contact must “[c]ause[]

great bodily harm, permanent disability, or permanent disfigurement.” *Id.* § 784.041(1)(b).

This Florida offense also satisfies the conduct and state-of-mind components of the elements clause. Starting with the conduct component, the offense always involves “force capable of causing physical pain or injury to another person.” *Johnson*, 559 U.S. at 140. To be sure, the Supreme Court has held that the force required for common-law battery does not suffice because it can include “even the slightest offensive touching.” *Id.* at 139. And the Florida offense here is a battery offense. But a key difference exists between this Florida offense and the common-law version. The Florida offense requires “great bodily harm, permanent disability, or permanent disfigurement” in every case. Fla. Stat. § 784.041(1)(b). The common-law offense does not. This fact makes all the difference. Indeed, the Court has since held that “any force that actually causes injury” qualifies as violent force. *Delligatti*, 604 U.S. at 432. Or, as Justice Scalia put it, “it is impossible to cause bodily injury without using force ‘capable of’ producing that result.” *United States v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring in the judgment) (quoting *Johnson*, 559 U.S. at 140); see *Stokeling*, 586 U.S. at 84-85.

Turning to the state-of-mind element, Florida’s offense always requires “purposeful” or at least “knowing” uses of force, so it does not include the reckless conduct that falls outside the elements clause. See *Borden*, 593 U.S. at 432 (plurality opinion). In particular, the text requires the defendant to “*intentionally* touch[] or strike[]” the victim. Fla. Stat. § 784.041(1)(a) (emphasis added). And Florida caselaw confirms that the defendant must, in fact, intend this touch or strike. See *Jefferies v.*

State, 849 So. 2d 401, 404 (Fla. Dist. Ct. App. 2003). Some cases again suggest that the required “intent” can exist if defendants know that their acts make it “substantially certain” that a touch or strike will occur. *See CB. v. State*, 810 So. 2d 1072, 1073 (Fla. Dist. Ct. App. 2002). Either way, though, the statute has more than “a *mens rea* of recklessness” and thus counts as a violent felony under the elements clause. *See Borden*, 593 U.S. at 445 (plurality opinion).

In response, Delaine points out that while this Florida offense requires a defendant to intentionally *use force*; it does not require the defendant to intentionally *cause injury*. *See Jefferies*, 849 So. 2d at 404. Put another way, so long as a defendant intentionally touches a victim, even an accidental injury that this force produces could fall within the statute. *See id.* And Delaine reads *Borden* as requiring a defendant to intend (or at least know) that harm will result from the force.

This argument finds no support in either the *Borden* plurality opinion or Justice Thomas’s concurrence in the judgment. To begin, Delaine mistakes a mere example in the plurality opinion for a holding that the elements clause requires a defendant to knowingly cause an injury. In a “background” part of its opinion (Part 11), the plurality summarized the differences between four states of mind: “purpose, knowledge, recklessness, and negligence.” *Borden*, 593 U.S. at 425-26 (plurality opinion). It said that a person acts knowingly if “he is aware that [a] result is practically certain to follow from his conduct[.]” *Id.* at 426 (citation omitted). The plurality then gave an example of what this state of mind requires, explaining that “[a] person who *injures* another knowingly’ makes ‘a deliberate choice with full awareness of consequent harm.’

Id. (emphasis added). Yet the plurality used this example only to differentiate a knowing mindset from a reckless one. It did not use the example when interpreting the elements clause.

The plurality's interpretation of that clause instead came in the next part of its opinion (Part III). *Id.* at 429-34. There, the plurality held that the clause's (implied) state-of-mind element concerned the *use of force*, not the *resulting harm*. The plurality first explained that the phrase "use of physical force" required "volitional" force. *Id.* at 430 (quoting *Voisine*, 579 U.S. at 693). It then explained that the phrase "against the person of another" required the victim to be the "conscious object" of this force. *Id.* Putting the two together, it decided that a defendant must 'consciously deploy[]' force against the other person. *Id.* at 432. Nowhere did the opinion suggest that the defendant must also intend (or know of) the injury that this force causes. Nor would such a reading fit the statutory text. The text says that the defendant must use "physical force against the person of another"; it does not say the defendant must "knowingly injure another."

Delaine's position fares no better under Justice Thomas's concurrence. True, Justice Thomas suggested that the phrase "use of physical force" alone had "a well-understood meaning applying only to intentional acts *designed to cause harm*." *Id.* at 446 (Thomas, J., concurring in the judgment) (emphasis added) (quoting *Voisine*, 579 U.S. at 713 (Thomas, J., dissenting)). And one might read this sentence to suggest that Justice Thomas believes that a defendant must intend to harm the victim. But things are not so simple. After all, Justice Thomas joined Justice Alito's dissent in *Johnson*, so he believes that even common-law battery includes enough

intentional force to fall within the elements clause. *See Johnson*, 559 U.S. at 145-47 (Alito, J., dissenting). He also adhered to that view in *Castleman*. 572 U.S. at 183-84 (Alito, J., concurring in the judgment). And he adhered to the view in *Voisine*, reconciling his position by explaining that the *harm* that he believes a defendant must intend includes any ‘nonconsensual touching.’ 579 U.S. at 701 n.1 (Thomas, J., dissenting). Because Justice Thomas would hold that the intent required for common-law battery makes that crime a “violent felony,” he would undoubtedly hold that Florida’s felony battery (an enhanced version of the common-law crime) also qualifies.

Still, his concurrence raises a question that matters here: Which *Borden* opinion—if any—controls on the state-of-mind question that Delaine has raised? Is it Justice Kagan’s plurality opinion for four Justices? Or Justice Thomas’s concurrence? Or is it neither opinion, such that we may decide Delaine’s question from first principles rather than precedent? The Supreme Court has yet to decide this so-called “*Marks*” question (named after *Marks v. United States*, 430 U.S. 188 (1977)). *See Delligatti*, 604 U.S. at 434 n.5. And judges have disagreed over it.

The disagreement arises from the “vexing task” of deciding which, if any, opinion controls when the Supreme Court does not issue a single majority opinion. *EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431 (6th Cir. 2020) (citation omitted), *abrogated on other grounds by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022). Under *Marks*, the writing that agrees with the ultimate judgment “on the narrowest grounds” represents the controlling one. 430 U.S. at 193 (citation omitted). We have indicated that whether one opinion is

narrower than another turns on the “results” or “outcomes” that the logic of both opinions will produce in later cases. *EMW*, 978 F.3d at 431 (citation omitted); *United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009). An opinion qualifies as the narrowest if it would reach the same result as the fractured judgment in “a logical subset” of all future cases where another non-majority opinion would reach that result. *Kratt*, 579 F.3d at 562 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)); see *EMW*, 978 F.3d at 431. When no opinion can meet this test (because each reaches results different from the fractured judgment under different sets of circumstances), “[t]he *Marks* rule is not workable” and the reasoning in none of the opinions binds us. *United States v. Ray*, 803 F.3d 244, 270-72 (6th Cir. 2015).

How do these rules play out here? The relevant ‘result[]’ of *Borden*’s fractured judgment was a finding that the state-law offense at issue did not qualify as a violent felony. *EMW*, 978 F.3d at 431 (citation omitted). And the plurality found that a statute would satisfy the elements clause if it at least included intentional or knowing states of mind, see 593 U.S. at 432 (plurality opinion), whereas Justice Thomas would cover only a statute that required ‘intentional acts designed to cause harm,’ *id.* at 446 (Thomas, J., concurring in the judgment). So some judges have treated the *Borden* plurality opinion as logically ‘narrower’ than Justice Thomas’s concurrence because the plurality would reach *Borden*’s result (a finding that a crime is not a violent felony) in a logical subset of the cases in which Justice Thomas would reach that result. *United States v. Gomez*, 165 F.4th 1199, 1208 (9th Cir. 2026) (en banc) (citation omitted); see *United States v. Kepler*, 74 F.4th 1292, 1302 n.11 (10th Cir. 2023).

These courts thus view the plurality opinion's reasoning as binding. *See Gomez*, 165 F.4th at 1208.

But again, Justice Thomas (who disagreed with *Johnson*) seemingly had a more lenient understanding of “harm” and “force” than did the plurality (which accepted *Johnson*). *See Voisine*, 579 U.S. at 701 n.1 (Thomas, J., dissenting). So some other judges have held that the reasoning in neither *Borden* opinion covers a logical subset of the other and thus that *Borden* itself establishes only a narrow holding: “that the elements clause excludes reckless conduct.” *Somers*, 66 F.4th at 895; *see Gomez*, 165 F.4th at 1214 (Collins, J., concurring in the judgment). These judges thus do not view either opinion as binding on questions that involve more demanding states of mind than recklessness. *See Gomez*, 165 F.4th at 1214 (Collins, J., concurring in the judgment).

We need not pick sides in this *Marks* debate because we hold that Florida felony battery qualifies as a violent felony under either view of *Borden*'s precedential effect. If the reasoning of the *Borden* plurality opinion controls, we have already explained that it supports our conclusion. The plurality required only that a defendant intentionally or knowingly use force against a victim-not that the defendant intend or know that this force will cause an injury. *See Borden*, 593 U.S. at 430-32 (plurality opinion). And if the reasoning of neither opinion controls, we would follow the decisions of the Seventh and Eleventh Circuits that have already answered the question. *See United States v. Vail-Bailon*, 868 F.3d 1293, 1299-1308 (11th Cir. 2017); *Douglas v. United States*, 858 F.3d 1069, 1071-72 (7th Cir. 2017); *see also United States v. Mendez*, 593 F. App'x 441, 443-44 (6th Cir. 2014). The plain text of the elements clause requires only an intent or knowledge with

respect to the force. We do not see how it can be read to require “a *separate* intent element attached to the degree of injury.” *Douglas*, 858 F.3d at 1072.

Delaine claims that this conclusion conflicts with the Ninth Circuit’s decision in *Gomez*. There, the en banc court held that a California conviction for assault with a deadly weapon did not meet the *Borden* plurality’s reasoning. *Gomez*, 165 F.4th at 1208-10. Critically, though, the court read the California crime not to “require an intent to apply force, knowledge that an action will cause force to be applied to another, or even subjective awareness of a risk that such force will result.” *Id.* at 1208. In other words, a defendant need not use intentional or knowing *force* (without regard to whether that force would cause *injury*). *Gomez* thus adheres to our view, which likewise requires the use of force to satisfy the applicable state-of-mind requirement.

Admittedly, another unpublished decision from the Ninth Circuit suggested that the *Borden* plurality required “an awareness of consequent harm[.]” *United States v. Vega*, 2023 WL 4858148, at *1 n.2 (9th Cir. July 31, 2023) (mem.). But *Vega* makes the same mistake that Delaine commits. The decision treated the explanatory analysis in the plurality opinion’s background section as a holding about what the statute’s state-of-mind requirement modifies: the injury. *Id.* Yet that state-of-mind requirement instead modifies the force component in the elements clause. And Florida felony battery requires an intentional use of force. As a result, that state-law offense qualifies as a violent felony under the elements clause.

3. Ohio Domestic Violence

We lastly reach Delaine’s Ohio conviction for domestic violence from 2019. The Ohio domestic-violence statute makes it a crime for a person to “knowingly cause or attempt to cause physical harm to a family or household member.” Ohio Rev. Code § 2919.25(A). Ohio law defines “[p]hysical harm to persons” to cover “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” *Id.* § 2901.01(A)(3). And it treats a domestic-violence conviction as a misdemeanor unless a defendant has a prior domestic-violence conviction, in which case the offense becomes a felony. *Id.* § 2919.25(D)(2)-(4). Because Delaine had a prior conviction, he pleaded guilty to the felony version.

This Ohio domestic-violence offense also meets the state-of-mind and conduct elements to qualify as a “violent felony” under the Armed Career Criminal Act. To start, Delaine does not challenge the state-of-mind element because the crime applies only if a defendant “knowingly” harms, or tries to harm, a victim. *Id.* § 2919.25(A); see *Borden*, 593 U.S. at 432 (plurality opinion). Next, we have already held that the offense satisfies the conduct element. See *United States v. Gatson*, 776 F.3d 405, 411 (6th Cir. 2015). As *Gatson* explained, the force that the Ohio law requires—force that causes an ‘injury, illness, or other physiological impairment,’ Ohio Rev. Code § 2901.01(A)(3)—is (almost “by definition”) “force ‘capable of causing physical injury or pain to another person.’” *Gatson*, 776 F.3d at 411 (quoting *Johnson*, 559 U.S. at 140). So our cases have repeatedly treated *Gatson* as binding on whether an Ohio domestic-violence conviction is a violent felony. See *United States v. Alexander*, 2023 WL 2682373, at *3 (6th Cir. Mar. 29, 2023); *United States v. Mitchell*, 2022 WL 12230276, at *3 (6th Cir. Oct. 21,

2022); *United States v. Marshall*, 2022 WL 11710803, at *1 (6th Cir. Oct. 20, 2022); *United States v. Mickel*, 2022 WL 1100459, at *2 (6th Cir. Apr. 13, 2022); *United States v. Melendez-Perez*, 2021 WL 3045781, at *2-3 (6th Cir. July 20, 2021); *United States v. Solomon*, 763 F. App'x 442, 445 (6th Cir. 2019).

Delaine disagrees for two reasons. *Reason One*: He first argues that *Gatson*'s holding did not survive *United States v. Taylor*, 596 U.S. 845 (2022). He is correct that we could reevaluate *Gatson* if a later Supreme Court decision called it into doubt. See *United States v. Fields*, 53 F.4th 1027, 1046-47 (6th Cir. 2022). But *Taylor* did no such thing. There, the Supreme Court held that attempted Hobbs Act robbery did not satisfy a similarly worded elements clause in another statute. See *Taylor*, 596 U.S. at 850-60. Yet a defendant may complete a Hobbs Act robbery through “actual or *threatened* force,” so the defendant need not use force in every case. 18 U.S.C. § 1951(b)(1) (emphasis added). Defendants who attempt a Hobbs Act robbery thus need not “attempt[]” the “use” of force because they could commit that crime by attempting to *threaten* force instead. *Id.* § 924(e)(2)(B)(i); see *Taylor*, 596 U.S. at 851-52.

According to Delaine, Ohio's domestic-violence offense suffers from the same problem. He claims that this offense does not qualify as a violent felony because a defendant can commit it through an “*attempt* to cause” an injury to a qualifying person. Ohio Rev. Code § 2919.25(A) (emphasis added). But he overlooks a key distinction between this case and *Taylor*. An Ohio domestic-violence offense will always include the *use* of force that causes the “physical harm” that the offense requires. *Id.* Unlike Hobbs Act robbery, then, the Ohio statute does not

include *threatened* force as an alternative way to commit the crime. *See id.* So someone who attempts this offense will always have “attempted” the “use” of force under the elements clause. 18 U.S.C. § 924(e)(2)(B)(i). And our court and many other courts have refused to expand *Taylor*’s logic to cover offenses (in particular, attempted murder) whose completed crime always entails the use of force. *See United States v. Parham*, 119 F.4th 488, 495 (6th Cir. 2024); *United States v. Martin*, 2023 WL 2755656, at *7 (6th Cir. Apr. 3, 2023); *see also United States v. Smith*, 165 F.4th 751, 757-62 (3d Cir. 2026); *United States v. Lassiter*, 96 F.4th 629, 637-39 (4th Cir. 2024); *United States v. Pastore*, 83 F.4th 113, 120-21 (2d Cir. 2023). The logic of this attempted-murder precedent applies to Delaine’s domestic-violence conviction.

Delaine responds that the elements clause uses the word ‘attempted’ in its ordinary sense (e.g., the party “[t]ried” to use force), not its specialized legal sense (e.g., the party “intended” to use force and took a “substantial step” to that result). Appellant’s Br. 44; I Oxford English Dictionary 764 (2d ed. 1989); *Taylor*, 596 U.S. at 851 (citation omitted). He also gives a hypothetical: a husband who buys a weapon and drives home to harm his wife has attempted domestic violence under Ohio law even if the police stop him on his way there. Appellant’s Br. 45. But according to Delaine, this husband has not “attempted” the “use” of force under the ordinary understanding of “attempted.” *See id.* We disagree. For starters, some courts have read the elements clause to adopt the legal meaning of “attempted” (not the ordinary one on which Delaine relies). *See Lassiter*, 96 F.4th at 638. Regardless, we need not choose between the two here. A reasonable speaker would believe that the husband in Delaine’s

hypothetical *tried* to use force. An “attempted use” of force need not involve only a swing and a miss. One would naturally say that a person tried to use force if the person had the intent to do so and took a substantial step in carrying out that intent. The legal and ordinary meanings thus likely collapse here.

We end with a disclaimer. The parties do not discuss in detail whether an attempted domestic-violence offense is divisible from a completed domestic-violence offense within the meaning of the Armed Career Criminal Act. *See Descamps*, 570 U.S. at 257. We need not decide the issue either. We flag it merely to make clear that we have left it open for another day.

Reason Two: Delaine alternatively argues that the Ohio domestic-violence offense (which covers any “physical harm,” Ohio Rev. Code § 2919.25(A)) does not always include the type of “*violent* force” that the elements clause requires. *Johnson*, 559 U.S. at 140. Delaine suggests that Ohio courts have given the phrases “injury” and “physiological impairment” in the statutory definition of “physical harm” a broad reach. Ohio Rev. Code § 2901.01(A)(3). For example, he points to a state decision that said a bank teller suffered a physiological impairment when she momentarily froze during a robbery. Appellant’s Br. 46-47 (discussing *State v. Vore*, 2014 WL 1488742, at *3-4 (Ohio Ct. App. Apr. 14, 2014)).

Gatson compels us to reject this argument. At the outset, though, the government may well have overread the scope of our stare decisis rules. In response to Delaine’s claim, it suggests that *Gatson* requires us to reject *every* potential reason why an Ohio domestic-violence offense might not qualify as a “violent felony.” *Cf. Brumbach v. United States*, 929 F.3d 791, 795 (6th Cir.

2019). We are not so sure. Suppose a decision in Case A rejects a defendant’s lone argument that a state-law conviction does not qualify as a violent crime because it does not meet the elements clause’s conduct requirement. Suppose a defendant in Case B then raises a distinct argument: that the state-law conviction does not qualify as a violent felony because it does not meet the elements clause’s state-of-mind requirement. Should Case A’s stare decisis effect alone require the panel in Case B to reject this state-of-mind argument without considering the merits? If it does, the Case A panel might have a duty to consider *every* conceivable claim about why a conviction does not qualify as a violent felony—even those that the first defendant did not raise. After all, if the panel did not do so, it might create binding (potentially mistaken) law on claims that merely “lurk[ed] in the record[.]” *Wright v. Spaulding*, 939 F.3d 695, 702 (6th Cir. 2019) (citation omitted). Yet this approach might also bump up against the party-presentation principle. See *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020). That principle perhaps explains why we have said that a decision is *not* binding on an issue if the decision did not “consciously” resolve the issue. *Wright*, 939 F.3d at 702.

At day’s end, we need not identify the precise scope of our stare decisis rules. Even if those rules have a narrower reach than the government proposes, *Gatson* still binds us. That opinion confronted Delaine’s *specific claim*: that Ohio’s domestic-violence statute does not require the “*violent* force” that the elements clause demands. *Johnson*, 559 U.S. at 140. When rejecting this argument, *Gatson* relied on the plain meaning of the Ohio definition of “physical harm” to conclude that the force that causes this harm reached the required level. 776 F.3d

at 410-11. And a recent Supreme Court decision reaffirms *Gatson*'s logic by explaining that "any force that actually causes injury" qualifies as violent force. *Delligatti*, 604 U.S. at 432. Yet because *Gatson* did not refer to the Ohio cases that Delaine now cites, he suggests that *Gatson* "was incorrectly decided" and asks us to reevaluate it using his purportedly better arguments. *Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001). *Gatson*, though, remains controlling on the issue that it "consciously reached" until a changed circumstance (such as a new Supreme Court precedent on the meaning of "violent felony" or a new Ohio Supreme Court decision on the meaning of 'physical harm') calls it into doubt. *Wright*, 939 F.3d at 702; see *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014). And Delaine points to no changed circumstance here.

We affirm.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

UNITED STATES OF
AMERICA

**JUDGMENT IN A
CRIMINAL CASE**

v.

Case number: **1:23-CR-
00069-CEA-MJD(1)**

MARIO DELAINE

Christopher Meadows
Defendant's Attorney

USM#74653-510

THE DEFENDANT:

- ☒ pleaded guilty to count: **One of the Indictment**
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense:

Title & Section and Nature of Offense	Date Violation Concluded	Count
18 U.S.C. § 922(g)(1) and 924(e)(1) – Felon in Possession of Firearm [Armed Career Criminal]	11/05/2022	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. § 3553.

- ☐ The defendant has been found not guilty on count(s).
- ☐ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

May 15, 2025

Date of Imposition of Judgment

Charles E. Atchley, Jr.

Signature of Judicial Officer

Charles E. Atchley Jr., United States District Judge

Name & Title of Judicial Officer

May 15, 2025

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **188 months as to Count One of the Indictment. This sentence is to run concurrently with Hamilton County, TN, General Sessions Court Docket Numbers 1892927-1892934 and concurrently with Brevard County, FL, Sessions Court Docket Number 05-2017-MM-017884-A. The defendant is to receive credit for time served since his arrest on November 5, 2022.**

- ☒ The court makes the following recommendations to the Bureau of Prisons:

The Court will recommend that the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons' Institution Residential Drug Abuse Treatment Program.

The Court will recommend that the defendant undergo a mental health evaluation and receive treatment as determined appropriate while incarcerated with the Bureau of Prisons.

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at ☐ a.m. ☐ p.m. on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on .

35a

- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on

to ,

at ,

with a certified copy of this judgment

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES
MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15

days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentencing of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic

expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any

time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the mandatory, standard, and any special conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall waive all rights to confidentiality regarding mental health and substance abuse treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the treatment providers.

The defendant shall submit his property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer or designee. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when a reasonable suspicion exists that the defendant has violated a condition of his supervision, and the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment **</u>
TOTALS	\$100.00	\$.00	\$.00	\$.00	\$.00

- ☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options under the Schedule of Payments sheet of this judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - ☐ the interest requirement is waived for the
 - ☐ fine ☐ restitution
 - ☐ the interest requirement for the
 - ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

**** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.**

***** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒** Lump sum payment of \$100.00 due immediately, balance due
- ☐ not later than , or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐** Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐** Payment in equal (*e.g., weekly, monthly, quarterly*) installments of \$ over a period of (*e.g., months or years*), to commence (*e.g., 30 or 60 days*) after the date of this judgment; or
- D ☐** Payment in equal (*e.g., weekly, monthly, quarterly*) installments of \$ over a period of (*e.g., months or years*), to commence (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or
- E ☐** Payment during the term of supervised release will commence within (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **U.S. District Court, 900 Georgia Avenue, Joel W. Solomon Federal Building, United States Courthouse, Chattanooga, TN, 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: **Glock, Model 19, 9-millimeter pistol, Serial Number BPLE895 and 31 rounds of assorted 9-**

millimeter ammunition, pursuant to the Agreed Preliminary Order of Forfeiture (Document Number 32).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX D

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

UNITED STATES OF AMERICA, Government, v. MARIO DELAINE, Defendant.	1:23-CR-69
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Chattanooga, Tennessee
May 15, 2025

BEFORE: THE HONORABLE CHARLES E.
ATCHLEY, JR.
UNITED STATES DISTRICT JUDGE
(Appearances on following page.)

SENTENCING

[2]

APPEARANCES:

FOR THE GOVERNMENT:

KEVIN BROWN
U.S. DEPARTMENT OF JUSTICE
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1110 Market Street

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Chattanooga, Tennessee 37402

LUKE A. McLAURIN
U.S. DEPARTMENT OF JUSTICE
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800 Market Street
Suite 211
Knoxville, Tennessee 37902

FOR THE DEFENDANT:

CHRISTOPHER MEADOWS
ERIN RUST
FEDERAL DEFENDER SERVICES
605 Chestnut Street
Suite 1310
Chattanooga, Tennessee 37450

[3]

THE COURT: Ms. Laster, would you call the case, please.

THE COURTROOM DEPUTY: Criminal action 1:23-CR-69, United States of America versus Mario Delaine.

THE COURT: All right. Would counsel please make appearances for the record.

MR. BROWN: Kevin Brown and Luke McLaurin for the United States.

MR. MEADOWS: Good afternoon, Your Honor.

Christopher Meadows for Mr. Delaine. I'm also for my -- by my colleague, Ms. Erin Rust.

THE COURT: All right. I believe we have a

representative of the Probation Office here.

Good afternoon, Mr. Delaine. This is your sentencing hearing.

In preparation for this hearing, the Court has reviewed the following documents: The indictment, the plea agreement, presentence report, defendant's notice of objections to the presentence report, government's response to defendant's objections, defendant's supplement and reply, government's notice of supplemental authority, addendum to the presentence report, agreed preliminary order of forfeiture, and sentencing recommendation of the probation officer. [4] Are there any additional materials to offer that the Court's not listed?

MR. BROWN: None from the government, Your Honor.

MR. MEADOWS: No, Your Honor.

THE COURT: All right. Mr. Meadows, have you and your client read the presentence report?

MR. MEADOWS: Yes, Your Honor, we have.

THE COURT: Have you had an opportunity to discuss it?

MR. MEADOWS: Yes, we have.

THE COURT: Mr. Delaine, have you read the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough time to speak to Mr. Meadows about it?

THE DEFENDANT: Yes, sir.

THE COURT: Has he answered all your questions?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: All right. So the Court will hear the parties on the objections to the presentence report first. Then the Court will calculate the advisory [5] guideline range. Then the Court -- the Court will hear the parties on this -- on why this Rule 11(c)(1)(C) plea agreement should be accepted after consideration of the 3553(a) factors, although it's my understanding it's an 11(c)(1)(C) only in that it caps the exposure the defendant has; is that correct?

MR. BROWN: That's correct, Your Honor.

MR. MEADOWS: Yes, Your Honor.

THE COURT: And then -- well, there's -- I think there's a couple others to the extent -- in the plea agreement as well.

MR. BROWN: There's a (c)(1)(B) -- (c)(1)(B) agreement asking the Court to recommend jail credit back to his original arrest date. Those charges have been dismissed--

THE COURT: The 2022?

MR. BROWN: -- in state court.

Yes.

THE COURT: And then, of course, after that, the Court will hear -- lastly, the Court will hear final statements -- including an opportunity to hear from you,

Mr. Delaine, if you wish. You do not have to say anything, but if you want to say something, I encourage you to --

THE DEFENDANT: Okay.

[6]

THE COURT: -- and then pronounce sentence.

Court notes that -- that there are some objections to the presentence report that have been filed. There's been quite a bit of briefing on this, but I do want to hear from both sides on this.

Let me summarize, and then you correct me where I'm wrong. Okay? So I think objection number one, defendant objects to the offenses listed in paragraph 47, 49, and 55 being counted as violent felonies under the Armed Career Criminal Act. He also objects to these offenses being counted as crimes of violence under the United States sentencing guidelines resulting in a base offense level of 24.

Defendant contends that none of these offenses qualify as either a violent felony or a crime of violence and, therefore, cannot be used to either designate him as an armed career criminal or increase his base offense level; is that correct?

MR. MEADOWS: Yes, Your Honor.

THE COURT: Now, we're talking about predicate felonies. It's my understanding Mr. Delaine admits to these felonies as part of his plea agreement, that they are -- that they are, in fact, his, and that they were committed on occasions separate and apart from one another.

[7]

MR. MEADOWS: That's correct, Your Honor.

THE COURT: Felony battery domestic violence in Florida, paragraph 47 of the PSR; aggravated assault with a firearm in Florida, paragraph 49 of the PSR; and domestic violence in Ohio, paragraph 55 of the PSR; is that correct?

MR. MEADOWS: Yes, Your Honor.

THE COURT: All right.

All right. Mr. Meadows, tell me -- tell me why you think the Court should grant your objections.

MR. MEADOWS: Yes, Your Honor. Thank you. Judge, I'll walk through those convictions one by one, and I'll start with the conviction for the 2012 aggravated assault from Florida. Judge, that conviction cannot count as a violent felony for the Armed Career Criminal Act.

THE COURT: You're talking about PSR paragraph 49?

MR. MEADOWS: Yes, Your Honor.

THE COURT: Okay.

MR. MEADOWS: Paragraph 49. I'm doing this in the order that it was briefed in our objections.

THE COURT: Okay.

MR. MEADOWS: Your Honor, Mr. Delaine's conviction for aggravated assault cannot count as a [8] predicate offense under the Armed Career Criminal Act because in 2012, when Mr. Delaine was convicted, recklessness conduct sufficed for conviction under the statute. We know through *United States v. Borden* that if an offense can be committed recklessly, it cannot count under the elements clause of the -- of the Armed Career Criminal Act. Even if the offense sounds violent, that does

not matter. The categorical approach looks at the elements of the offense and determines whether or not the least culpable conduct would be covered by those elements.

Mr. Delaine was convicted in Brevard County. Brevard County is in Florida's Fifth District Court of Appeals. And at the time he was convicted, the case law that was controlling at the time did uphold convictions for aggravated assault based off reckless mens -- mens rea. The reason that matters, Judge, is because the categorical approach is not a question of statutory interpretation. It is a question of what a jury would have found, what courts were doing at the time, and what conduct would have qualified for a conviction at that time.

And *United States v. McNeill* and *United States v. Mathis* and *United States v. Brown* all clarified that the categorical approach is a [9] backward-looking question. The only way to answer that question is to consult the law that applied at the time of conviction.

United States v. Brown further clarifies that you still consult the law at the time of the conviction even if that law subsequently changed. The government pointed out in its briefing -- and I expect that they'll do that here in a moment -- that eventually, a couple of years ago, the Florida Supreme Court said that reckless conduct cannot qualify, but that case came out 10 years after Mr. Delaine was convicted of the offense and about 14 years after he committed the offense.

Judge, you look at the law at the time that the offense occurred -- when the -- when the conviction occurred, and at that time, the controlling precedent in Florida's Fifth District Court of Appeals permitted convictions for

aggravated assault based off a recklessness mens rea.

In its briefing, the government talked a lot about the Eleventh Circuit's opinion. The Eleventh Circuit is an outlier, Judge, and it's an outlier for a reason. The Eleventh Circuit did not properly follow the categorical approach. And, again, it's key here for the Court not to conflate theories of statutory interpretation with the categorical approach. The [10] categorical approach does not ask what has the law always been. It asks what was going on at the time. And at the time that Mr. Delaine was convicted, reckless conduct qualified, and because of that, it cannot qualify as a conviction for a violent felony.

Every other appellate circuit that has approached this issue with the categorical approach has gone the other way, including the Seventh Circuit, which held that the same conviction that Mr. Delaine -- aggravated assault in Florida, if it was before 2022, it cannot qualify under the Armed Career Criminal Act.

Judge, we're not even asking the Court to go out on a limb here. If the Court follows the categorical approach and looks at the -- at the state of the law at the time of the conviction, it's clear that reckless conduct qualified, and because of that, Mr. Delaine's conviction for aggravated assault cannot count as a violent felony for the Armed Career Criminal Act.

And, Judge, I'm prepared to move on to the next predicate, unless the Court would like for us to switch spots for the government to argue just as to --

THE COURT: What about -- government filed the jury instructions from 2010, which predate his conviction, which show that anyone tried for this -- for [11] this offense, they would be instructed that the defendant

would had to have acted intentionally; right?

MR. MEADOWS: Your Honor, I'm not so sure that we would concede that. Yes, those are the jury instructions that you can Google and find, and I suspect that that's what the government did, but that does not change the case law that was in effect at the time. A defense attorney in Brevard County, Florida, if they're aware of the case law of the time, would advise their client, hey, man, even if you think you acted recklessly, that's enough for you to be convicted here. To counsel somebody otherwise would probably have been malpractice for that attorney.

Again, you don't look at the jury instructions necessarily. You look at what the courts were applying. And the courts were applying reckless conduct to aggravated assault. And, frankly, the Court can even disagree as to the reasoning of Florida's Fifth District Court of Appeals, but that's not the question either. The question is how the law was being interpreted at that time. And because they were upholding convictions based off reckless conduct -- and we cite cases specifically, *LaValley v. State* and *Kelly v. State*. Because of that, it cannot qualify, Judge.

THE COURT: All right. Thank you. [12]

You want to move on to the -- did you have more on that one, or did you want to move on to the other one?

MR. MEADOWS: Your Honor, I can move on to the other ones, unless the Court would like the government to respond just to that --

THE COURT: No, I'm going to -- I'm just going to hear you on all three, and then I'm going to -- I'm going to

hear the government.

MR. MEADOWS: Yes, Your Honor. Thank you.

THE COURT: Thank you.

MR. MEADOWS: Your Honor, Mr. Delaine's conviction for felony domestic battery from 2009 also cannot count as -- as a violent felony under the Armed Career Criminal Act because the statute does not require any intent at all to cause the harm. It only requires a volitional act. A volitional touching, contact.

Again, I'll direct the Court back to *United States v. Borden*. There's a plurality opinion, and there's also a narrower concurrence from Justice Thomas. Whichever opinion controls here, Mr. Delaine wins. If you look at *Borden*, *Borden* goes through step by step each mens rea from purposeful conduct, knowing conduct, recklessness, and negligence in descending order. What differentiates those higher culpabilities, knowing and [13] purpose, is someone's acknowledgment or even desire to cause harm.

And even though the Court has not reconsidered this Florida statute since *Borden* was decided, *Borden* directs the Court in a pretty easy direction that this offense, because it does not require any intent to cause the harm, cannot qualify. This means that in Florida, as long as you desire to actually make physical contact with somebody even if you don't intend to harm them -- you can even intend the opposite. You could be patting somebody on the back, but if they fall, break their neck, that can qualify as felony battery in Florida. And that is not enough.

And if Justice Thomas's concurrence applies here, then the government can't win. Justice Thomas agrees with us that not only do you have to commit a volitional

act, intend to make contact, or make knowing contact, you also have to intend or be practically certain of the harm that results. And that is not the case under Florida's felony battery statute.

I'll also point out that Florida has multiple battery statutes. Their aggravated battery statute actually requires that the person intend the harm caused, not just that they intend to make physical contact with the person. The aggravated statute would [14] almost definitely qualify as a violent -- a violent felony under the Armed Career Criminal Act, but that's not what Mr. Delaine was -- was convicted of in 2009. He was convicted of felony domestic battery, not aggravated.

Again, what -- what elevates conduct that qualifies as a violent felony has got to be an acknowledgment, either you're aware, you're now practically certain of the harm caused, or you intend the harm caused. But a simple reading of the statute, Your Honor, shows that the only thing you have to intend is to make physical contact. And under *Borden*, under either analysis, that can't be enough.

THE COURT: All right.

MR. MEADOWS: And, Your Honor, as to the -- the 2019 Ohio conviction for domestic violence --

THE COURT: Real quick -- and I --

MR. MEADOWS: Yes.

THE COURT: -- I certainly do want to hear you on this. But are you asking me to go against what the Sixth Circuit says?

MR. MEADOWS: For -- for the Ohio statute, Your Honor? Your Honor, we point out in our -- in our pleadings that there is that case that -- it's from the Sixth

Circuit. We do contend that it doesn't qualify. [15] But for now, we're going to rely on our pleadings just to preserve the issue. We still maintain that it does not qualify as a crime of violence for the guidelines or a violent felony for the Armed Career Criminal Act.

THE COURT: All right. I'll certainly hear what all you have to say, but it's -- the Court's understanding is that -- that there is some controlling authority on that in the Sixth Circuit.

MR. MEADOWS: And, Your Honor, I can now move on to the guidelines argument.

THE COURT: Sure.

MR. MEADOWS: Your Honor, we -- we objected to that in great detail. The government, in its response, did not approach that topic at all. We would argue that the government has actually waived any arguments that any of those predicate offenses would qualify as crimes of violence under the guidelines.

But regardless of that, Your Honor, they still don't -- they still do not qualify for several reasons. First off, the felony battery from 2009 can't count because it was not used as any criminal history points. In order for it to qualify as a crime of violence under the guidelines, you've got to get some criminal history points from that. The PSR correctly attributes zero points to that conviction.

[16] As for Florida's aggravated assault, although it is an enumerated offense as a crime of violence under the guidelines, you have to compare Florida's statute with a generic version that the Supreme Court has upheld. Florida's aggravated assault statute's wider than the generic version of aggravated assault, one, because it also

includes threatening conduct unlike the generic definition. Next, the Florida statute's wider because the mere possession of a gun is enough. Rather, the generic version requires some use of a dangerous weapon. Florida also defines the phrase "deadly weapon" more broadly, whereas Florida defines a deadly weapon as any object that's likely to cause harm, whereas the generic definition that the Supreme Court acknowledges defines deadly weapon as an item known to be capable of producing death or serious bodily injuries. They don't match, and the Florida version is wider than the generic version.

Likely -- again, if reckless conduct is enough to convict someone in Florida's Fifth District Court of Appeals at the time, it still cannot count as a predicate felony for a crime of violence under the guidelines.

And as for the Ohio domestic -- domestic violence, we still contend that that does not qualify as [17] a crime of violence, and we rest on our opinions as to that offense in particular.

THE COURT: I -- I hear you on -- on your guideline argument. Doesn't this kind of raise and fall on the Armed Career Criminal -- I mean, if I find that he's -- that he qualifies for the Armed Career Criminal Act, regardless of what his guidelines are, the Court has to sentence him to 180 months.

MR. MEADOWS: That's correct, Your Honor. And we argue that in the alternative, depending on how the Court rules on that issue.

THE COURT: All right. Thank you.

MR. MEADOWS: Yes. Thank you, Your Honor. Unless Your Honor has any other questions.

THE COURT: Not now, but I may.

MR. MEADOWS: Yes, Your Honor.

THE COURT: Who's arguing for the government?
Mr. McLaurin?

MR. McLAURIN: Yes, Your Honor.

THE COURT: All right. Thank you.

All right.

MR. McLAURIN: Good afternoon, Your Honor.

THE COURT: Afternoon.

Talk -- tell me about Florida aggravated assault.

[18] MR. McLAURIN: Absolutely, Your Honor. I'd just like to clarify at the outset that there's agreement in the parties between the -- in terms of the analysis you use. You are supposed to look to what the state of the law was. You look at the law that the defendant was convicted under and how that law was defined at the time of the offense.

Now, Florida's assault statute has not changed. The assault statute that Mr. -- the aggravated assault -- assault statutes that Mr. Delaine's convicted under in this case are the very same ones that the Supreme Court of Florida considered in *Somers*, and it interpreted that language to mean what it plainly says, that the offense requires a mens rea of intentionality. That's -- that's on the face of the statute itself. And there has been a false suggestion in all of defendant's briefing in this case that the state of Florida law was somehow different pre-*Somers*. That is not the case. He -- his reliance on particularly *LaValley* and *Kelly* is grossly misplaced. Those cases did not hold and do not say that a defendant in Florida could have been convicted

for mere reckless conduct.

I'd like to start specifically with *LaValley* because if you look at that case, that case just stands for the very noncontroversial proposition that reckless [19] driving can be considered a lesser included offense of aggravated assault by intentionally driving and threatening somebody. And -- and that's -- that's -- that doesn't say anything about the elements of intentional aggravated assault other than to confirm that when you have an offense that can be committed intentionally, an offense that can be committed recklessly is a lesser included offense. That's always been the case. There's nothing in *LaValley* that says an aggravated assault can be committed by reckless conduct. So if *LaValley* does not stand at all for the proposition that they're citing it for, I would say it's -- it's completely useless to them as a case.

Kelly did involve an aggravated assault conviction, and it does say, admittedly, some odd things that seem inconsistent with the language of the statute. But I think it's -- what's notable in *Kelly* is if you actually look at why the court upholds the conviction, it says that the actions here involved conduct that was knowing, that -- it says the evidence is clear that *Kelly* knew Dorothy was in the car she was driving, yet shot into her car not once, but three times. So, again, what we have here is a case that involves the defendant convicted of aggravated assault based on knowing and intentional conduct.

[20] And I think what's important is -- is to look at how the -- the Supreme Court has said we apply the categorical approach. The court says you start by looking at the language of the statute, and here the language of the statute is really clear. The language of the statute says it requires an intentional mens rea. The Florida Supreme

Court has recently confirmed yes, the statute, in fact, means what it says. If the defendant is trying to claim that the Florida courts have somehow -- or at the time of his offense somehow interpreted the language of the statute to mean something different than what it plainly says, the burden is on him to show a realistic probability that courts were, in fact, applying this statute to conduct that wouldn't be qualifying conduct. He hasn't met that burden.

And the Supreme Court in *Duenas-Alvarez* was very clear that the defendant has to point to at least a case where the -- where state courts have applied this statute to nonqualifying conduct in order to show a realistic probability and not just a theoretical possibility. He hasn't pointed to a single case. As we pointed out in our brief, there is not a single case in Florida case law where this aggravated assault statute -- the assault statute has ever been applied to [21] somebody who recklessly threatened another. There's no case for that whatsoever. So there's not -- there is not a realistic probability that Florida courts would ever have applied this statute to reckless conduct.

And I think that's further confirmed when we look at the jury instructions. And I know that my -- my friend on the other side tried to dismiss those jury instructions as well, it's just something -- something that the government Googled. Well, certainly those instructions can be found on Google, but those instructions were created by a committee of a state bar that was specifically authorized to create those instructions by the Florida Supreme Court.

And as we pointed out in our notice of filing, the Rules of Criminal Procedure that were in place at the time in 2010 in Florida specifically said to district courts you should use the -- the case law from the Florida Supreme

Court said you should use the standard instructions, and the rule said if you do not use the standard instruction, you have to file a written opinion explaining why and explaining why you think the standard instruction is an error of law. We don't have any cases where they've pointed to where a court said that that standard instruction that was adopted in '81, modified in '97 -- again, all before the conduct [22] involved in this case. That standard instruction, that was the law.

And -- and if we're looking at a realistic probability of is it -- is it possible that there was a jury out there that could have convicted somebody for reckless conduct, the answer to this question has to be no. If the standard instruction is telling the jury that you have to find intentional conduct, then there is no reasonable possibility -- I would say there's no theoretical possibility, let alone a reasonable probability that somebody could have been convicted under the statute for engaging in reckless conduct.

The -- the defendant's arguments essentially are relying on cases that -- in one case, *LaValley*, is not even on point at all, and *Kelly*, a case that doesn't even really support their position. And the government, by contrast, has pointed to several cases both pre-2010 and post-2010 in which Florida appellate courts have expressly reversed convictions for -- for aggravated assault where the -- the-- there was not proof that the defendant acted intentionally, and they said we have to reverse it because there's not proof that they -- there wasn't sufficient proof that he acted intentionally.

THE COURT: I think there was one in 2008; right?

[23] MR. BROWN: That's correct, yeah. There was

one in 2008. I can -- I can -- if you give me just --

THE COURT: I've -- I've got it. Thank you.

MR. BROWN: There are several cases. One in 2008. There's -- there's one in 2009. There's -- there's cases, again, both pre-2010 and post-2010, that say the exact same thing. That is a much stronger evidence than *Kelly*, a case where the defendant did, in fact, act intentionally and the conviction was affirmed.

So what we're faced with is a situation where the statute on its face says it requires an intentional mens rea. The Supreme Court, whose, we would submit, interpretation of that statute is binding and tells us what -- under Florida law, tells us what that statute has always meant since its inception, says that -- that the statute means what it says, intentional mens rea. We have numerous courts of appeals' decisions saying that -- reversing convictions when there wasn't sufficient evidence of intentionality, and we have no cases whatsoever in which a defendant was convicted of this offense for having a reckless mens rea.

Given that scenario, I don't think the Court can say that there is a realistic possibility that this statute ever could have been applied to reckless conduct [24] either at the time Mr. Delaine committed the offense or later. And -- and we would ask the Court to treat the Florida Supreme Court's -- Florida interpretation as binding.

In response, I would just make -- like to make one other additional point about their response to *Alexander*, the Seventh Circuit's decision. We pointed out some pretty serious analytical flaws in that opinion in our -- in our brief, but I'd like to point out one other thing that -- that -- that they don't seem to even acknowledge is that in

that Seventh Circuit case, the Seventh Circuit said, well, look, if it were true under Florida law that -- that what *Rivers* says about statutes, that when a supreme court interprets a statute, it's telling us what the statutes already meant, if that were true under Florida law, then that would mean that this counts. The Seventh Circuit said then, well, we think Florida law doesn't say that. The Seventh Circuit was patently wrong. We pointed this Court to a case where Florida law has said no, we interpret -- that rule that applies in federal cases is the same one that we apply in state cases. So, I mean, the Seventh Circuit was just simply wrong about that point. And that point was a critical assumption of the Seventh Circuit's analysis. And the Seventh Circuit [25] itself even said, look, if this were Florida law, like, then it would mean this offense counts. Well, we provided you evidence that that is, in fact, Florida law.

I mean, I'm happy to answer any other questions about this offense, but we think it is pretty straightforward. The -- the statute means what it says on its face. The Florida Supreme Court, whose interpretation of that statute is binding on this Court, has said that's what the statute means. The jury instructions that were -- that were authorized, the pattern jury instructions that should have been used at the time he committed his offense said that it requires an intentional mens rea. Numerous cases say it requires an intentional mens rea. And the few cases he pointed to don't even say what he says they say.

So we -- we would ask this Court to find that the aggravated assault offense counts as a violent felony.

Unless there are questions on this offense, I'll move on to the others.

THE COURT: Please move on.

MR. McLAURIN: So with the second offense, I -- I think it's also quite clear from just the plain language of the offense that it counts. I mean, the -- [26] the offense-- I think -- I think there's no dispute that this offense has an intentional mens rea, and there's no dispute it involves the requisite level of force because it requires somebody striking another person in a way that, in fact, causes great bodily harm. So they have to be using force that is capable of causing physical pain or injury in order to, in fact, cause great bodily harm.

And -- and that principle was recently reaffirmed by the Supreme Court in its *Delligatti* decision from earlier this year where the Supreme Court expressly said that when somebody -- their specific holding in that case is that when an individual knowingly, intentionally causes bodily injury that that amounts to a use of physical force for purposes of 924(c), which has an identically worded -- or mostly identically worded use of force clause to the Armed Career Criminal Act.

I think the big dispute with this felony battery issue is that the defendant's -- the defendant appears to have misread *Borden* and its holding. He is saying that *Borden* -- he's suggesting that *Borden* said only purposeful offenses count, and that is -- *Borden* said no, knowing offenses are sufficient. He is arguing that you have to have an intent to actually harm an [27] individual, but that's not what the language of the use of force clause requires, and that's not what *Borden* requires. It requires an intent -- you have to intentionally be using force against another individual, and then that force has to be the kind of force that is capable of causing physical pain or injury.

Now, you do not have to actually intend to cause somebody injury. You do have to intend to use the force, but you don't have to intend to cause them injury. And this statute -- we -- we will concede the statute does not require an intent to cause harm. The Florida courts are pretty clear. But then -- but the Florida courts are also pretty clear that the statute requires an intent to strike. That is an intent to use force against another individual. That is all that the Armed Career Criminal Act requires.

Their reading of *Borden*, I think, is misplaced, and their reading of *Borden* -- again, I think it's confirmed when you look at the -- the 7-2 decision in *Delligatti*, which specifically said that, like, knowingly or intentionally causing bodily injury is a use of force. It doesn't require the person to purposely cause bodily injury in order for it to qualify as use of force. They've said knowing and intentionally causing bodily injury. That is consistent with *Borden*. [28] And -- and *Borden's* holding -- I think the only thing we can take away from *Borden* because of the split decision is that a mens rea recklessness isn't enough.

Delligatti confirms that knowing and intentional conduct is sufficient. And -- and -- and, again, that's -- that's all that the act requires. It doesn't require this intent to injure. That's -- that's not a requirement of the law. It's not required by the plain language of the statute. It's not required by the Supreme Court decision. So I think that's where their argument fails on felony battery.

Unless there are other questions about felony battery, I'm happy to turn to the last offense.

The last offense, I think, is pretty straightforward as well. I -- I think it's easy for this Court because the Sixth Circuit has already expressly considered this statute. And

contrary to all the arguments they make in their brief, the Sixth Circuit did, in fact, expressly consider this argument. The Sixth Circuit's analysis wasn't especially lengthy, but it did expressly say, look, when you are causing physical harm under Ohio law, under Ohio's definition of physical harm, that requires using physical force. And that holding is, I would say, consistent with and now required by the Supreme Court's holding in *Delligatti*, [29] which, again, *Delligatti* says knowing, intentionally causing bodily injury counts as a use of physical force. That's exactly what we have in the Ohio statute at issue here.

And we think the issue with the Ohio statute is particularly easy for the Court because there is binding Sixth Circuit precedent. That precedent, contrary to what the defendants claim, does directly -- did directly consider the very arguments defendant made here, and it rejected them. The defendant's mere disagreement with the Sixth Circuit decision is not a basis on which this Court can refuse to follow that decision.

THE COURT: What about the guidelines argument?

MR. BROWN: Your Honor, our position is that these offenses, because they count under the use of force under the Armed Career Criminal Act clause, they also count under the use of force guidelines. I mean, we -- we -- we do not waive any response to their argument. We -- I mean, addressing that argument is somewhat unnecessary, as the Court pointed out, based on the --

THE COURT: Well, the Court does need to correctly calculate the guidelines regardless of what direction the Court may go.

MR. BROWN: That's true. But if the Court -- [30] if

he is an armed career criminal, then the -- whether 2K- -- the 2K2.1(b) enhancement applies, the 2- -- the 2K base offense level -- excuse me -- will not affect his guidelines range because his guidelines range will be determined by Chapter 4.

Now, I would point out for the Court his criminal history is going to be the same regardless of his armed career criminal status, and I'm sure my colleague will address that in talking -- in addressing the 3553(a) factors because Mr. Delaine has a very extensive criminal history. But his criminal history is going to be the same. His guidelines range -- the base offense level is going to be driven by the -- the Armed Career Criminal Act designation. But our argument -- I mean, again, the -- the -- for the same reasons that these offenses count as violent felonies, they also count as crimes of violence because the use of force clauses in those two things is identical. There are numerous Sixth Circuit cases that say if it counts under the use of force clause for the Armed Career Criminal Act, it counts under the use of force clause for the guidelines, and so that is our position.

We -- we do disagree -- I just note for the record the government does not concede that Florida aggravated assault is not generic aggravated assault. [31] We disagree with the defendant's argument on that. But we don't think the Court needs to wade into the intricacies of what qualifies as generic aggravated assault when the aggravated assault here falls under the use of force clause.

THE COURT: All right. Thank you.

Mr. Meadows, did you want to respond?

MR. MEADOWS: Yes, Your Honor. Could you give me 30 seconds and I'll be ready?

THE COURT: Sure.

MR. MEADOWS: Thank you. I don't want to hold myself to 30 seconds, but just a little bit.

(Off-the-record discussion between defense counsel.)

MR. MEADOWS: Thank you for the indulgence, Your Honor.

THE COURT: Take your time.

MR. MEADOWS: Your Honor, I'll -- I'll start again with the Florida aggravated assault.

THE COURT: That seems to be the one that is meatiest.

MR. MEADOWS: The government is on shaky ground, we would say, Your Honor. We don't disagree that the statute has the word "intent" in it, and that's likely why the jury instructions have that. The issue [32] is that in the district where Mr. Delaine was convicted, they were interpreting that intent -- that intent mens rea element as subsuming reckless conduct. That's the issue.

And even if the government doesn't like the reasoning in *LaValley* or *Kelly*, they can disagree completely, but that was the case law that was on the books at the time that Mr. Delaine committed the offense and at the time that Mr. Delaine was convicted of the offense.

Moreover, Judge, they talked a lot about the reasonable probability. We briefed that in our reply. It's on, I believe, footnote number four. And the recent Supreme Court cases and Sixth Circuit cases, most -- most particularly, *United States v. Cervenak*, you only get to that point when the issue is whether or not courts were applying the statute in those fashions. Our arguments are

about the elements of the offense, and at the time that Mr. Delaine was convicted, the elements of the offense in the Fifth District Court of Appeals included reckless conduct.

THE COURT: Weren't the elements the same thing that they are right now?

MR. MEADOWS: That's correct, Your Honor. But, again, they talked a lot about the case law, [33] *Kelly v. State* and *LaValley v. State*, but they never even quoted it. In *Kelly v. State*, they agreed that aggravated assault is a crime of intent, but they go on to say, "as here there's no proof of an intentional assault on the victim, that proof may be supplied by proof of" -- "equivalent to a culpable negligence or by proof of willful or reckless disregard for the safety of others."

Judge, again, we're not saying that this Court has to agree with the reasoning of the Fifth District Court of Appeals in Florida, but that was the case law at the time. The question is not whether or not the law has always meant that. The categorical approach looks at what courts were doing at the time. We look at the least culpable -- the least culpable conduct that would be sufficient to convict somebody under the categorical approach.

Their reliance on *Rivers* is misplaced because it has no place in the categorical approach. It's also a civil case. It doesn't have to grapple with issues of the ex post facto clause and due process. Mr. Delaine was convicted in 2012, and the case that the Eleventh Circuit relies on -- or that they're relying on here to bind the Court from the Florida Supreme Court was issued in 2022.

[34] Again, this is not an issue of statutory interpretation about what the law may or may not have always meant. You look at what courts were doing at the

time. And at the time Mr. Delaine was convicted, recklessness counted. And if that's the case, it cannot qualify as a violent felony for the Armed Career Criminal Act.

Your Honor, I'll move on to, again, the Florida felony battery. Two main points: One, that the government just conceded that they agree that the statute does not require anyone to intend the harm caused. And if you actually look at *Borden*, I think the government actually misreads *Borden*. They said that *Borden* -- what we agree about is that *Borden* clarifies that purposeful or intentional conduct or knowing conduct qualifies, but *Borden* goes deeper than that in its reasoning saying a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk attached to his conduct." "A person acts negligently if he is not but should be aware of such a substantial and unjustifiable risk."

And, again, Judge, I'll point you to the language of the statute. I'm not sure that either party issued an exhibit, but I think we agree about what the statute actually says. A person commits felony battery [35] if he or she actually and intentionally touches or strikes another person against the will of the other and causes great bodily harm, permanent disability, or permanent disfigurement.

The government talked a lot about the word "strike" and not about the word "touch." The word "touch" would be less culpable conduct than the word "strike." And, again, you've got to look at what the least culpable conduct is.

And, again, Your Honor, if you read *Borden* and how they define recklessness and negligence, it's all about someone's awareness or desire for the harm caused. To

violate Florida's felony domestic battery, you don't even have to intend the harm caused. And if the government's right, then there is no difference between Florida's felony battery and their aggravated battery because their aggravated battery does require someone to intend the harm caused. They probably have different battery statutes for this reason. And because of that, Your Honor, it can't qualify.

And one more point. They do talk about *Delligatti*. I think their -- their belief that *Delligatti* forecloses our argument is misplaced. *Delligatti* all has to do with the level of force required, not the mens rea. Our argument here is about [36] the mens rea -- the mens rea required to convict someone of Florida's felony battery. And we submit that after *Borden*, it cannot qualify because reckless conduct would be sufficient there because you don't have to intend the harm caused.

And, of course, we'd stand by our objections as to the guideline range. We understand that it is dependent on the Court's decision as to Armed Career Criminal Act, but we also believe that the government has waived those arguments. And they may be very confident about their argument that Mr. Delaine qualifies for the inherent sentence, but if the Court made that decision, they have not briefed it, they have not responded to it, and I do believe that they've waived that argument, Judge.

THE COURT: All right. I'm not -- I'm not going to find that they've waived, but I do understand your point. Thank you.

MR. MEADOWS: Yes, Your Honor. Thank you.

THE COURT: Anything more?

MR. McLAURIN: Just -- just a brief response --

THE COURT: Okay.

MR. McLAURIN: -- about one -- one of the points that they raised.

In -- in response, with regard to the [37] aggravated assault thing, the -- my friend on the other side cites the Sixth Circuit's recent en banc decision in *Cervenak*.

THE COURT: Uh-huh.

MR. McLAURIN: And he noted it in his reply and footnote. Unfortunately, he has read that decision exactly backwards. The decision actually confirms the point that the government was making earlier, and the decision talks about *Duenas-Alvarez*, and it says that where you don't need a realistic probability is if you're looking and saying, hey, the language of the statute itself reaches this; right? If the plain language of the statute reaches something, you don't need to go into looking in depth at the case law. But where the realistic probability comes in is -- is when you have a situation where the defendant, nonetheless, argued that state courts interpreted the state offense to reach conduct beyond the federal offense in a manner not clearly contemplated by the statute's text. That's when they have to come forward with some cases to show yeah, in fact, the courts do apply this in a way that is inconsistent or apparently inconsistent with the statute's text. That's exactly the situation we're dealing with here.

The statute's text is plain. The Florida [38] Supreme Court has interpreted that text. The jury instructions explained that text to a Florida jury in a plain way that requires intentional mens rea. And they're claiming, well, no, intentional actually means something different, that

the courts have interpreted it to mean something different, yet they've actually provided no evidence that that is true.

LaValley didn't purport to interpret the elements of aggravated assault to provide a gloss on the statute. It was simply answering the question of whether a reckless driving offense was a lesser included offense of intentional aggravated assault. And the fact that an offense with a reckless mens rea can be a lesser included offense within -- an offense with an intentional mens rea is -- that's well settled in numerous jurisdictions. So the -- the mere fact that it found reckless driving to be a lesser included is really a non -- a nonissue. It doesn't -- that case stands for nothing with regard to aggravated assault is the government's position.

Kelly -- we agree *Kelly* has some odd -- *Kelly* has some odd language. But I think if you look at the full context of *Kelly*, it talks about culpable negligence, but it also talks about willful and wanton. And it's talking about what kind of evidence is [39] sufficient to show intent. And it begins by saying aggravated assault is a crime of intent, and it concludes by saying, hey, the evidence was sufficient here because it showed intent, and the evidence it points to is evidence the defendant was acting knowingly and that -- and with -- you know, that -- that they knew the person was in a vehicle and they shot at them. That is not a situation of reckless conduct.

And they have pointed to -- despite being given many opportunities, they've pointed to absolutely zero cases where somebody's been convicted under the statute for using reckless conduct. And -- and I think that that in and of itself should be devastating to their -- to their point.

So, again, to summarize, our position is Florida law has never included even at the time of this offense never-- not even in the Fifth District permitted convictions based on reckless conduct. They haven't shown -- they haven't met their burden of proving otherwise under the reasonable probability standard.

And then as far as his point about touch or strike, again, touch or strike doesn't matter. If you are intentionally touching somebody, you're intentionally striking somebody, you're intentionally [40] using force against them. That's what *Borden* requires. They're asking this Court to import a purposeful requirement on top of their -- the -- the knowing or intentional requirement. And *Borden* expressly declined to do that. It said you don't need to have that highest mens rea standard of purpose.

And my colleague suggested, well, then, why does Florida have these different degrees? Because everyone agrees that somebody who uses force with an intent to actually harm somebody is a little bit more culpable, so it makes sense that they would have different gradations. But our -- our position is that both of those offenses -- yeah, the more serious one of aggravated battery, yeah, that's going to count too, but this one also counts because what the use of force clause is focused on is not whether somebody, like, had the -- the purpose to harm somebody, but whether they intentionally used force in a way that actually did harm somebody. That's -- that's all that the law requires, and we think this offense counts for that reason.

THE COURT: Thank you.

Mr. Meadows, I -- I spent a lot of time going through

this material. Did you have anything more? I'm sorry.

MR. MEADOWS: One moment, Your Honor.

[41] THE COURT: Okay.

(Off-the-record discussion between defense counsel.)

MR. MEADOWS: Judge, just briefly. And I may be able to do this from here.

THE COURT: Okay. What --

MR. MEADOWS: Yes. Your Honor, as to the -- I'll -- I'll start with the aggravated assault again. Again --

(Off-the-record discussion between defense counsel.)

MR. MEADOWS: Okay. Sorry. I'll start with the battery here. *Borden* requires a level of force that's violent, not just volitional. If you look at the Florida statute, it only requires a volitional act. You don't have to intend to cause the harm. You may be completely unaware of the harm that's caused, Judge. Because of that, it -- it can't qualify.

And one last point on the aggravated assault conviction. The Eleventh Circuit is an outlier for the reasons -- for clear reasons. Again, every other circuit that has approached the issue of how the law is changed afterwards has gone the other way, including the Seventh Circuit. We're not asking the Court to do something that's against the grain. We're asking the [42] Court to follow the categorical approach.

THE COURT: All right. Thank you.

MR. MEADOWS: Thank you.

THE COURT: Thank you both. And I appreciate all the briefing.

I understand that these types of issues are very thorny, and the landscape changes on these types of issues frequently, so -- but I -- I did spend quite a bit of time reviewing that over the last few days going back and looking.

Mr. Meadows, I hear you on some of this. I think you've raised some interesting issues, but I am going to overrule your objections. Okay?

Number one, the Court feels -- believes that the Florida aggravated assault statute does qualify under the Armed Career Criminal Act. It -- that -- that it demonstrates -- and all the evidence that the Court can find is that it -- you can't violate this statute recklessly. You are required to intentionally commit this. The Florida Supreme Court has weighed in on this. And every -- everything has given this Court, including a plain reading of that statute -- the Court believes that it qualifies under the Armed Career Criminal Act.

On the Florida felony battery, the Court also finds that it requires an intent to use force, and that [43] because of that use -- that intent to use force, that it -- it qualifies under the Armed Career Criminal Act, and, therefore, would be a predicate offense.

And then, lastly, of course, as -- as you've graciously conceded -- I understand that you don't agree with this, but the Ohio domestic violence statute has been litigated. The Sixth Circuit has found in *Gaston* that it does qualify as a violent felony under the Armed Career Criminal Act, and the Court is going to follow the Sixth Circuit on that and does find that his conviction does trigger the Armed Career Criminal Act.

Based upon those findings, the Court finds that he

does have three predicate offenses that do trigger the Armed Career Criminal Act.

Also, I heard you on your United States sentencing guideline argument, but the Court believes that -- that -- that since these three convictions that he's been found to have committed do qualify as -- as violent felonies under the Armed Career Criminal Act, they also qualify as crimes of violence under the United States sentencing guidelines. Therefore, the Court respectfully overrules your objections.

Now, the Court adopts the presentence report, therefore, without objections.

Mr. Brown, do you wish to make a motion for the [44] extra point under the guidelines?

MR. BROWN: I so move, Your Honor.

THE COURT: All right. Given these findings and calculations, the Court calculates the following advisory guideline range: Defendant's offense level is a 31. Defendant's criminal history category is a VI, which results in an advisory guideline range of 188 to 235 months' imprisonment, a supervised release range following imprisonment of two to five years, a potential fine range of 30,000 to \$250,000, and a mandatory special assessment of \$100.

Are there any objections to the Court's calculation other than, of course, you've already preserved that, but an additional objection?

MR. MEADOWS: With our arguments preserved, we have no additional objection.

THE COURT: All right. Any objection to the Court's calculation?

MR. BROWN: No, Your Honor.

THE COURT: All right. Mr. Delaine, you entered a plea agreement to -- a plea of guilty to Count 1 of your indictment. At your change of plea hearing, the Court deferred acceptance of your plea agreement until it had an opportunity to consider the presentence report in your case. If I accept your plea [45] agreement with the government pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the agreed disposition will be included in your judgment. This will include a sentence not to exceed 200 months' imprisonment followed by a lawful term of supervised release. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: Understanding this, are you asking me to accept your plea agreement with the government?

THE DEFENDANT: Yes, sir.

THE COURT: I'm sorry?

(Off-the-record discussion between the defendant and defense counsel.)

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir.

United States Sentencing Guideline Section 6B1.2(C) provides the Court may accept a Rule 11(c)(1)(C) plea agreement if it is satisfied either that: One, the agreed sentence is within the relevant guideline range; or, two, the agreed sentence is outside the relevant guideline range, but for justifiable reasons. Here, the agreed-upon maximum term of imprisonment is within the relevant guideline range of 188 to 235 months.

Court will hear parties on the [46] 18 U.S.C. 3553(a) factors and why it should accept this plea agreement. I'll start with the United States. I assume, Mr. Brown, or Mr. McLaurin. I --

MR. BROWN: I'll argue it, Your Honor.

Your Honor, essentially, the Court has 20 months to play here with between 180, the mandatory minimum, and the 200-month cap in the plea agreement.

THE COURT: Right.

MR. BROWN: Judge, I submit that the defendant's history and characteristics, the nature and circumstances of the offense, the need to promote respect for the law and protect the public all necessitate a 200-month sentence.

Your Honor, I often stand before you -- and I heard Mr. Clark do it in an earlier case -- that oftentimes, one of the 3553(a) factors stick out. They don't here. They all do.

The nature and circumstances of the offense. Judge, plain and simple, it's a miracle there's not a dead police officer, a dead hotel employee, a dead guest, or a dead --

THE COURT: Or -- or --

MR. BROWN: -- innocent bystander.

THE COURT: Or a dead Mr. Delaine.

MR. BROWN: Correct, or -- or his friend that [47] was in his hotel room. There were 54 shell casings inside that hotel room.

His history and characteristics. Judge, Mr. Delaine's history and characteristics are exactly the type that the Armed Career Criminal Act was meant to encompass. From his juvenile adjudication for battery when he was 17

years old in 2002, Mr. Delaine has engaged in a consistent pattern of lawbreaking and not minor lawbreaking, Judge. Mr. Delaine has unlawfully carried firearms, unlawfully possessed drugs, engaged in acts of violence, engaged in multiple acts of domestic violence, provided false ID to law enforcement, tampered with evidence, possessed drug paraphernalia, possessed a firearm as a convicted felon.

Judge, if you look at the facts of some of these battery and domestic assault convictions, Mr. Delaine has choked, hit, and otherwise struck multiple intimate partners. Judge, in one of his convictions, the complainant indicated that both she and Mr. Delaine had consumed alcohol and she had not eaten that day. The complainant stated she sat down to eat when Mr. Delaine became angry, calling her names and commented about her weight. Mr. Delaine then grabbed the complainant by her throat and choked her. Mr. Delaine grabbed a firearm, held the firearm to her [48] head, and stated explicative, "I will kill you."

THE COURT: I've read it, Mr. Brown.

MR. BROWN: Judge, Mr. Delaine is a danger to the public. He's a danger to his friends and acquaintances, not just the general public. The only way that a sentence can reflect the seriousness of this offense and adequately address the 3553(a) factors is if the Court sentences him to 200 months in the Bureau of Prisons, and I ask the Court to do so.

THE COURT: Thank you.

Mr. Meadows?

MR. MEADOWS: Thank you, Your Honor.

Your Honor, I'm asking the Court to impose a sentence below the guidelines to 180 months. That

sentence would be sufficient, but not greater than necessary to accomplish the goals of sentencing.

Judge, the PSRs never paint my clients in a good light, and they also never capture my clients' entire personal life. The government talked a lot about allegations of abuse. Mr. Delaine was also the victim of an abusive household from his mother and other relatives. Twice as a young man he ran away from home. He is also -- likely has undiagnosed mental health illnesses that probably followed him for much of his life. And that doesn't excuse the conduct, but it helps [49] paint a better picture, a clearer picture of who Mr. Delaine is.

At this point, I -- I've known Mr. Delaine for about 20 months now, and he's not the monster that the government says that he is. Again, I understand that the facts of the case are not great, but I think the silver lining here is -- and the government may disagree -- even though there are shots fired, Mr. Delaine was having some sort of an episode. He genuinely believed -- genuinely believed that somebody was trying to break into that hotel room. But at the time that the officers finally yelled "Chattanooga police, stop firing," he stopped. He stopped. He came outside, put his hands up, and he surrendered. And, again, that doesn't justify everything, but it paints a different picture here. It paints a more clear picture.

Judge, ultimately, 180 months, even though it's below the guidelines, will still be the most time Mr. Delaine has ever been incarcerated. And that's what he gets. And that's still going to be enough to satisfy the goals of sentencing.

We're also going to ask the Court to recommend in the judgment a mental health assessment as well as --

THE COURT: Would you say that again?

MR. MEADOWS: A mental health assessment, [50] Judge. Again, the PSR doesn't identify or diagnose disorders, but it's very likely that he does have something that is undiagnosed.

We also ask the Court implement -- excuse me -- recommend the residential drug treatment as well as job corps.

And, Judge, at the end of the day, I'll never stand in front of the Court representing a perfect person. And I understand that the PSR's never going to paint my client in a beautiful light. But, again, at this point, it captures the conduct, and 180 months would still be the highest amount of time he's ever been in custody. It's sufficient, but not greater than necessary to fulfill the goals of sentencing; therefore, that should be the sentence, and that would be a legal sentence.

Judge, there's also a pending charge in paragraph 60 of the PSR.

THE COURT: I think that was part of your agreement, wasn't it?

MR. MEADOWS: No. So that -- that had to do with the pending case in Hamilton County that has been dismissed.

THE COURT: Right.

MR. MEADOWS: But in paragraph 60, there's [51] something out of Brevard County from 2017.

THE COURT: Paragraph 60?

MR. MEADOWS: Yes, Your Honor . It's on page 17. It says that there's a bench warrant issued.

THE COURT: Misuse of 9-1-1, placing false 9-1-1 calls?

MR. MEADOWS: Yes, Your Honor. And I -- I don't know what happened there, but we would ask the Court run it concurrently just in case something does --

THE COURT: Mr. Brown?

MR. BROWN: I'll leave it to the Court's discretion.

MR. MEADOWS: Your Honor, again, we believe a sentence at the bottom of the guidelines, which is the minimum sentence allowed under the Armed Career Criminal Act, is sufficient, but not greater than necessary to fulfill the goals of sentencing.

Thank you, Judge.

THE COURT: Thank you.

Mr. Delaine, a defendant has the right to make a statement or to present any information to mitigate a sentence. Do you wish to make a statement now or to present any additional information?

THE DEFENDANT: Yes, sir. I just -- I would like to apologize to the Court for my -- for what I did. [52] I was wrong. I know I was wrong. And I just want to let you know that I'm not the same person that I was when I did commit them -- them crimes, the old crimes, you know. And I don't want you to judge me like that based on that, sir.

THE COURT: All right. Thank you.

THE DEFENDANT: Yeah.

THE COURT: Mr. -- Mr. Meadows, the Court, I guess, is going to interpret your request for a sentence for

a motion for a variance under the guidelines.

I will say that after reviewing the record as a whole, the Court can't in clear conscience grant a motion for variance in this particular case. And, in particular, the Court relies on the seriousness and the circumstances around the instant offense.

Now, his -- his own criminal history is -- it's absolutely horrendous, and it involves really nothing but violence. But the Court feels like that has been taken into account in his criminal history score. But the circumstances of this offense, the danger that took place with the instant offense, it's absolutely a miracle no one was killed -- it -- it really is -- including Mr. Delaine, regardless of -- of whether or not he may have been suffering from some psychotic [53] episode. But the Court cannot grant a variance downward.

That being said, we are only -- we're looking at, based upon the terms of the plea agreement and the -- the bottom of the guideline range, which the Court feels like the guideline range is appropriate in this case, not a whole lot of room in there. And so Court's going to give you the benefit of the doubt on the guideline range.

So upon considering the presentence report and counsel's statements here today as well as the 3553(a) factors, defendant's history and characteristics, and the nature and circumstances of the offense, the Court finds that the agreed-upon maximum potential sentence adequately reflects the seriousness of the offense. It also protects the public from further crimes of the defendant. Further, it will deter criminal activity both generally and specifically.

Based upon that, Court had deferred acceptance of

the plea agreement till it had an opportunity to consider the presentence report; however, the Court now accepts the plea agreement.

Now, Mr. Meadows, do you want to add anything on behalf of Mr. Delaine before I pronounce sentence?

MR. MEADOWS: Your Honor, if the Court's not [54] inclined to grant -- grant a downward variance, we'd ask the Court to impose sentence at the bottom of the guidelines.

THE COURT: Thank you.

MR. MEADOWS: Yes, Your Honor.

MR. BROWN: Nothing further, Your Honor.

THE COURT: All right. Thank you, Mr. Brown.

MR. BROWN: Yes, sir.

THE COURT: Mr. Delaine, the Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, and the advisory guideline range as well as the other factors listed in Title 18 United States Code Section 3553(a). Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court on Count 1 of the indictment that the defendant, Mario Delaine, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 188 months.

This is to be served concurrently with the Hamilton County Sessions Court, Docket Numbers 1892927 through 1892934, and Brevard County, Florida bench warrant 05-207- -- -2017-MM-017884-A.

Court will also give Mr. Delaine jail credit resulting from his arrest on November the 5th, 2022. It's my

understanding that's the terms of your [55] agreement; correct?

MR. BROWN: Yes. Yes, sir, that the Court recommend the Bureau of Prisons--

THE COURT: Yes.

MR. BROWN: -- count his sentence as starting November 5, 2022 --

THE COURT: Court --

MR. BROWN: -- if it's consistent with the statute.

THE COURT: Right. Court recommends that.

Court will recommend the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons institution residential drug abuse treatment program.

Court recommends the defendant undergo a mental health evaluation and receive treatment as determined appropriate while incarcerated within the Bureau of Prisons.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years.

While on supervised release, you shall not commit another federal, state, or local crime. You must not unlawfully possess and must refrain from use of a controlled substance.

[56] You must comply with the standard conditions that have been adopted by this Court in Local Rule 83.10. In particular, you must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon.

Defendant shall cooperate with the collection of DNA as directed.

In addition, the defendant shall comply with the following special conditions: Defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse as directed by the probation officer till such time as the defendant is released from the program by the probation officer.

Defendant shall participate in a program of mental health treatment as directed by the probation officer until such time as the defendant is released from the program by the probation officer.

Defendant shall waive all rights to confidentiality regarding mental health and substance abuse treatment in order to allow release of information to the supervising United States probation officer and to authorize open communication -- authorize open communication between the probation officer and treatment providers.

Defendant shall submit his property, house, [57] residence, vehicle, papers, computers, as defined in 18 United States Code Section 1030(e)(1), other electronic communications or data storage devices or media, or office to a search conducted by the United States probation officer or designee. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to search pursuant to this condition only when a reasonable suspicion exists that the defendant has violated a condition of his supervision and the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

It's further ordered the defendant pay to the United States a special assessment of \$100 pursuant to Title 18 United States Code Section 3013, which shall be due immediately.

Court finds the defendant does not have the ability to pay a fine. The Court will waive the fine in this case.

Pursuant to the notice of forfeiture, the defendant agrees to forfeit a Glock Model 19 nine-millimeter pistol, serial number BPLE895, and 31 rounds of assorted nine-millimeter ammunition.

[58] All documents sealed in defendant's case are now ordered to remain sealed pending further orders of the Court.

Does either party have any objections to the sentence just pronounced by the Court that have not been previously raised?

MR. BROWN: None from the United States, Your Honor.

MR. MEADOWS: Not that haven't been previously raised.

THE COURT: Thank you.

Mr. Delaine, you have the right to appeal your conviction and the right to appeal your sentence; however, a defendant may waive those rights as part of a plea agreement, and you've entered into a plea agreement that waives some or all of your rights to appeal. Such waivers are generally enforceable, but if you believe the waiver is unenforceable, you may present that theory to the appellate court.

Any notice of appeal must be filed within 14 days of

the entry of judgment or within 14 days of the filing of a notice of appeal by the government. If requested, the clerk will prepare and file a notice of appeal on your behalf. If you cannot afford to pay the cost of an appeal or for appellate counsel, you have the [59] right to apply for leave to appeal in forma pauperis, which means you can apply to have the Court waive the filing fee. On appeal, you may also apply for court-appointed counsel.

Mr. Delaine, you've -- you've got just a horrible criminal history, and it's a history of violence. And the instant offense was -- was a violent crime. I could have sentenced you to more, but, honestly, the Court feels like 188 months is enough in this instance.

Good luck to you, Mr. Delaine. I really would like to see you get your life together.

THE DEFENDANT: Thank you, sir.

THE COURT: Good luck to you.

Are there any other matters to resolve in this case?

MR. BROWN: No, thank you, Your Honor.

MR. MEADOWS: No, Your Honor. Thank you.

THE COURT: Thank you.

He's remanded to your custody, Mr. Marshal.

END OF PROCEEDINGS

I, Stephanie Fernandez, do hereby certify that I reported in machine shorthand the proceedings in the above-styled cause, and that this transcript is an accurate record of said proceedings.

90a

s/Stephanie Fernandez
Stephanie Fernandez,
Official Court Reporter